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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VIRGINIA C. MOON, on her own behalf and on behalf of the Peters, Rush, Habib & McKenna Profit Sharing Plan,

Plaintiff,

v.

DAVID H. RUSH, MARK A. HABIB, and JAMES P. MCKENNA,

Defendants.

No. 2:11-cv-3102-GEB-CKD

ORDER DENYING PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff and Counterdefendant Virginia Moon seeks a temporary restraining order ("TRO") under Federal Rule of Civil Procedure ("Rule") 65(b) barring Defendant and Counterclaimant David Rush from filing a partition lawsuit in state court concerning the real property at 1525 Dayton Road in Chico, California ("the Property"). Rush opposes the motion (ECF No. 139.) Rush, Moon and the Plan are co-owners of the Property. (ECF No. 131.)

I. LEGAL STANDARD

To obtain a TRO, a party must demonstrate that "[s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in h[er] favor, and that an

1 injunction is in the public interest.” Winter v. Natural Res.
2 Council, 555 U.S. 7, 20 (2008). “[I]f a plaintiff can only show
3 that there are ‘serious questions going to the merits’—a lesser
4 showing than likelihood of success on the merits—then a [TRO]...
5 may still issue if the ‘balance of the hardships tips sharply in
6 the plaintiff’s favor,’ and the other two Winter factors are
7 satisfied.” Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d
8 1281, 1291 (9th Cir. 2013) (quoting Alliance for the Wild Rockies
9 v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011)). “The [Winter]
10 test is conjunctive, meaning that the party seeking the [TRO]...
11 must satisfy each element.” Wells Fargo Bank v. SFR Inv. Pool 1,
12 LLC, No. 2:13-CV-1375 JCM (PAL), 2013 WL 6231373, at *2 (D. Nev.
13 Dec. 2, 2013.)

14 II. DISCUSSION

15 A. Likelihood of Success on the Merits/Serious Questions 16 Going to the Merits

17 Moon argues she is entitled to a TRO since she alleges
18 in her Complaint, in pertinent part, that Rush violated his
19 fiduciary duties to the Plan “[b]y placing himself in a
20 conflicted position with respect to the Plan [Property by],
21 engaging in prohibited transactions, . . . [such as] taking for
22 himself rents and tax benefits attributable to the Dayton Road
23 property owed to the Plan and/or Ms. Moon.” (Compl. ¶ 91, ECF No.
24 2.) Moon argues she is a beneficiary of the Plan, and since Rush
25 was a Plan fiduciary, and simultaneously part owner of the
26 Property in his individual capacity, he failed to perform the
27 fiduciary obligations he owed the Plan and therefore Moon is
28 likely to prevail on her equitable claim for an order “equitably

1 restor[ing] the Dayton Road property to [her]." (Compl. Prayer
2 for Relief As to the Seventh Claims for Relief, ECF No. 2.) Moon
3 argues that if Rush files a partition lawsuit in state court, she
4 would be deprived of this equitable relief.

5 Rush counters that even if Moon could show a likelihood
6 of success on this breach of fiduciary duty claim, it is not
7 likely that she would receive an order equitably restoring his
8 interest in the Property to her since he and Moon have had
9 agreements that clearly would not favor such equitable relief.

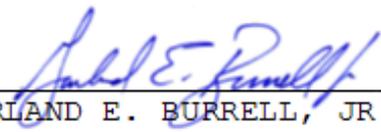
10 "Serious questions" in the context of a TRO are those
11 that are so "substantial, difficult, and doubtful, as to make
12 them a fair ground for litigation and thus for more deliberative
13 investigation." Republic of Philippines v. Marcos, 826 F.2d 1355,
14 1362 (9th Cir. 1988) (citation omitted).

15 In light of the agreements and disagreements Moon and
16 Rush have had concerning the Property, Moon has not raised
17 serious questions that she is likely to prevail on her equitable
18 restoration claim as she contends.

19 **III. CONCLUSION**

20 For the reasons stated, Moon's motion for a temporary
21 restraining order is DENIED.

22 Dated: January 21, 2015

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25 _____
26 GARIAND E. BURRELL, JR.
27 Senior United States District Judge
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